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DISABILITY OF PARTNER OR JOINT ADVENTURER TO TAKE RENEWAL OF FIRM LEASE

The close scrutiny which the courts give to the conduct of fiduciaries is exemplified in the numerous cases in which fiduciaries have attempted to renew in their own names leases in which they were interested in their fiduciary capacity. The leading case on

the general subject, *Keech v. Sandford*,[1] involved a renewal by an infant's trustee, after the lessor had refused to renew to the infant. Lord Chancellor King stated, in his oft quoted opinion:

"I must consider this as a trust for the infant; for I may well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust-estates would be renewed to cestui que use; though I do not say there is a fraud in this case, yet he should rather have let it run out, than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that the rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to cestui que use."

The theory of this case has been applied to various fiduciary relationships.[2] Its applicability to partnerships was definitely decided in *Featherstonhaugh v. Fenwick*,[3] where a partner had secretly taken a renewal of the partnership lease and subsequently exercised his power of dissolving the partnership by notice. Later cases decided that the disability of the partner existed even where the partnership contract fixed a definite period of duration and the renewal was to commence after that period had come to an end;[4] where the partners had quarrelled, making dissolution inevitable;[5] or where the partnership had already been dissolved at the time the renewal was taken.[6] It has been held immaterial that the new lease prohibited assignment without the consent of the lessor.[7] The disability applies to the representatives of a deceased partner;[8] and to a surviving partner.[9] But the claim may be barred by laches;[10] and, seem-

[1] Select cases in Chancery 61, 25 Eng. Rep. 223 (1726).

[2] Holt v. Holt, 1 Cas. Ch. 190 (1671) (executor); Robinson v. Jewett, 116 N. Y. 40, 22 N. E. 224 (1889) (director of corporation); Gower v. Andrew, 59 Cal. 119 (1881) (confidential clerk); Davis v. Hamlin, 103 Ill. 39 (1883) (manager of theatre); Grumley v. Webb, 44 Mo. 444 (1869) (managing agent); Steinberg v. Steinberg, 123 Misc. 764, 206 N. Y. Supp. 134 (Sup. Ct. 1924) (employee-relative); Turner v. Fryberger, 94 Minn. 433, 103 N. W. 217 (1905) (attorney of administrator). See, generally, note in 2 WHITE & TUDOR, LEADING CASES IN EQUITY (8th ed. 1912) 707; Note (1907) 7 ANN. CAS. 297.

[3] 17 Ves. 298 (1810).

[4] Mitchell v. Reed, 61 N. Y. 123 (1874), 84 N. Y. 556 (1881).

[5] Knapp v. Reed, 88 Neb. 754, 130 N. W. 430, 32 L. R. A. (N. S.) 869 (1911).

[6] Johnson's Appeal, 115 Pa. 129, 8 Atl. 36 (1886); Spiess v. Rosswog, 63 How. Pr. 401 (N. Y. Super. Ct. 1882), *aff'd*, 96 N. Y. 651 (1884).

[7] Ladas v. Psiharis, 241 Mich. 101, 216 N. W. 458 (1927); *cf.* O'Brien v. Egan, 5 L. R. Ir. 633 (1880) (renewal by life-tenant held to inure to benefit of remainderman).

[8] Alder v. Fouracre, 3 Swans. 489 (1818).

[9] Clements v. Hall, 2 DeG. & J. 173 (1857).

[10] Clegg v. Edmondson, 8 DeG. M. & G. 787 (1857); *cf.* Clements v.

ingly, conduct subsequent to knowledge of the renewal may be interpreted as a waiver of the power of compelling an interest in the new lease.[11] The fact that a third person is a party to the renewal seems immaterial where he had notice of the facts.[12] Relief in the form of a declaration of trust, an accounting for the value of the lease, or an injunction[13] against the use of the lease for other than partnership purposes appear to be equally available.[14]

An examination of the facts of the cases reveals elements of fraud in some instances, as where the renewing partner deliberately allowed the old lease to lapse, though he was relied upon to make the payments;[15] where the partner took the renewal after he had agreed to renew in the name of the partnership;[16] where the partner without authority surrendered the old lease and took the new one;[17] where the partner secretly cancelled the old lease and renewed to himself.[18] It is clear, however, that these elements of fraud are unnecessary; that secrecy in the transaction is sufficient to invoke the operation of the rule.[19] It would not have been strange if the courts had made the result of each case depend upon whether, in the light of all the circumstances, the particular transaction was unfair or unethical. But it has evidently been deemed more desirable to have a more rigid standard; to err on the side of requiring too much rather than too little of a fiduciary.[20] The requirement of frank disclosure does not seem unreasonable.

Hall, *supra* note 9. These cases indicate that the courts will not permit a partner to take an unfair advantage of the rule by lying by until it is certain that the venture is a success.

[11] *Cf.* Beatty v. Guggenheim Exploration Co., 225 N. Y. 380, 122 N. E. 378 (1919) (principal-agent case); Sandy River R. R. v. Stubbs, 77 Me. 594, 2 Atl. 9 (1885) (case of director of corporation).

[12] *Cf.* Gower v. Andrew, *supra* note 2 (case of confidential clerk).

[13] Alder v. Fouracre, *supra* note 8 (injunction granted against use for other than partnership purposes; but court refused to enjoin lessor from making the renewal).

[14] But in Browne v. Scull, 27 Pa. Super. 513 (1905), where a declaration of trust was denied, the court implied that it would have granted an accounting.

[15] Hollowell v. Satterfield, 185 Ky. 397, 215 S. W. 63 (1919).

[16] Lurie v. Pinanski, 215 Mass. 229, 102 N. E. 629 (1913).

[17] Palmer v. Young, 1 Vern. 276 (1684).

[18] Sneed v. Deal, 53 Ark. 152, 13 S. W. 703 (1890).

[19] In most of the cases cited *supra* notes 3 to 15, the element of secrecy alone was sufficiently operative.

[20] Compare the language of Cardozo, J. in connection with a similar problem of fiduciary conduct in Wendt v. Fischer, 243 N. Y. 439, 443, 154 N. E. 303, 304 (1926): "The law 'does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed. . .' Only by this uncompromising rigidity has

Whether a full disclosure will remove the partner's disability is not clear. The cases in which secrecy is involved generally stress that fact and imply that a different result might be reached if that element were not present.[21] But in the case of *Clegg v. Edmondson*,[22] it was held that "mere communication of the intention on the part of the managing partners to apply for the new lease for their own benefit" would not prevent the renewal from being impressed with a trust. In this case the partners who renewed were the managing partners of a mine, and the court felt that despite the notification the other partners were not on an equal footing as to the opportunity of taking advantage of the possibility of renewal. The case has been criticized as carrying the rule too far,[23] and of the few cases which involve a renewal without any secrecy several have reached a contrary result on the ground that the purpose of the rule is satisfied where the partner acts openly in the transaction.[24]

It is frequently said that the disability with respect to renewal does not apply to a purchase by a partner of the reversion.[25] The strongest case observing this distinction is *Bevan v. Webb*.[26] The court bases the distinction on the ground that the reversion is not, like a renewal, "a graft upon the old stock." This argument will bear some analysis. Calling the renewal a graft upon the old stock indicates that the renewal is regarded as partnership property, like an increase of livestock; so that when the partner takes the renewal to himself he is appropriating a partnership asset. Strictly speaking, however, it is clear that the asset of the partnership consists in its expectancy of renewal rather than in the renewal itself. The purchase of the reversion would seem to deprive the firm of this expectancy quite as effectively as a renewal. The identification of the renewal and the expectancy is probably traceable to the fact that ancient agricultural leases, whether held from colleges, ecclesiastical bodies,

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the rule of undivided loyalty been maintained against disintegrating erosion."

[21] Thus it was said in Featherstonhaugh v. Fenwick, *supra* note 3, at 312: "They ought first to have given him notice and to have placed him on equal terms with them; and then, if Mr. W. had thought proper to give them the preference, the case might admit of a different construction."

[22] *Supra* note 10. In this case the claim was held barred by laches.

[23] 1 ROWLEY, MODERN LAW OF PARTNERSHIP (1916) 467.

[24] Chittenden v. Witbeck, 50 Mich. 401, 15 N. W. 526 (1883); Tygart v. Wilson, 39 App. Div. 58, 56 N. Y. Supp. 827 (3d Dep't 1899). *A fortiori* where the lessor had refused to renew to the firm. Jacksonville Cigar Co. v. Dozier, 53 Fla. 1059, 43 So. 523 (1907) (case of director of corporation).

[25] See Anderson v. Lemon, 8 N. Y. 236, 237 (1853).

[26] [1905] 1 Ch. 620. *Accord:* Donleavey v. Johnston, 24 Cal. App. 319, 141 Pac. 229 (1914); Batchelor v. Whitaker, 88 N. C. 350 (1883); see Griffith v. Owen, [1907] 1 Ch. 195, 204.

or private persons, were renewable by custom as a matter of course.[27] The modern lessor of urban property feels no such obligation to renew to his tenant. It is not so close to the facts today to say that when the partner takes the renewal he is appropriating a partnership asset. It is believed that the true basis for the disability of the partner to renew to himself, as brought out in the cases, is not that he is taking property from the firm but that his actions do not conform to the standard required of one in the position of trust and confidence which a partner occupies.[28] From this point of view the conduct of the partner is judged by the broad test of whether it is the type of conduct which the courts may safely sanction in a partner rather than by the narrower test of whether the interest obtained was a "graft upon the old stock." The distinction made as to the purchase of the reversion then becomes very doubtful. On this basis the rule of *Bevan v. Webb* was repudiated by a New York court.[29]

A recent case[30] in New York, which divided the Court of Appeals four to three, affords an interesting study since the relationship involved was not quite a partnership and the transaction something more than a renewal. The facts were as follows: the defendant, a real estate dealer, leased a hotel site for twenty years. While negotiating for the lease he had been negotiating with the plaintiff for the necessary funds. Soon after the lease was executed plaintiff and defendant drew up a written agreement defining their relations in the lease. Plaintiff agreed to contribute half of the sums necessary for operation and to bear half of the losses. In return plaintiff was to receive half of the profits. The exclusive control over management and operation was vested in the defendant. Under the defendant's direction the venture became a great financial success. Shortly before the expiration of the lease the lessor approached the defendant with the proposition of a new lease to include a large amount of adjoining property, to be developed as a single tract. Defendant took the lease in the name of a corporation which he owned and controlled. It was for a greatly increased rental; required the destruction of existing buildings and the erection of one large building; and was not assignable without the consent of the lessor. The transaction was kept secret from

[27] See 5 BACON, NEW ABRIDGMENT OF THE LAW (1813) Leases (U)* 221.

[28] See Mitchell v. Reed, *supra* note 4, at 134; Featherstonhaugh v. Fenwick, *supra* note 3, at 312.

[29] Maas v. Goldman, 122 Misc. 221, 203 N. Y. Supp. 524 (Sup. Ct. 1924), *aff'd*, 210 App. Div. 845, 206 N. Y. Supp. 930 (1st Dep't 1924), approved in (1924) 33 YALE L. J. 885. See criticism of Bevan v. Webb in Hart, *Development of the Rule in Keech v. Sandford* (1905) 21 L. Q. REV. 258.

[30] Meinhard v. Salmon, 249 N. Y. 458, 164 N. E. 545 (1928).

the plaintiff who learned of the new lease only after its execution. The plaintiff at once demanded that the lease be held in trust and the joint venture continued. Upon refusal by the defendant, plaintiff sued to have the trust declared. The referee found that the original agreement did not create a partnership but that the plaintiff, nevertheless, as "joint-adventurer" had an equitable interest in the old lease which entitled him to a 25% interest in the new lease.[31] On cross-appeals to the Appellate Division,[32] plaintiff's interest was increased to 50%. Defendant appealed. In the Court of Appeals a bare majority, speaking through Cardozo, C. J., decided that plaintiff was entitled to a half interest in the new lease.

The dissenting opinion raises several points. It is maintained, first, that the plaintiff did not share the expectancy of renewal since by the original agreement he was entitled only to an interest in a twenty-year venture. This may well be disputed. It can as reasonably be argued that one who invests heavily for twenty years in a real estate development does not intend or expect that at the end of the period the power of renewal, rendered valuable by the co-operative venture, should inure entirely to the benefit of his associate. The reasoning of *Mitchell v. Reed*,[33] to the effect that partners share the expectancy of renewal even though the partnership articles call for a definitely limited term, seems equally applicable here. The point made next is that since the relationship here is not strictly a partnership the standard of conduct required is not so rigid as in the partnership cases. The distinction appears unwarranted. It may be true that the label "joint adventure" does not in itself necessarily imply a factual relation of trust and confidence so strong as in the normal partnership. In the instant case, however, since the plaintiff shared in profits and losses, it was only the fact that he did not share in "control" which prevented him from being a "partner." [34] This allocation of entire control to the defendant would seem to increase rather than decrease the fiduciary element in the relation of the parties.[35] The dissent finally argues that the secret purchase of the reversion by a

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[31] This figure was reached on the basis that the old lease in which plaintiff had a half interest covered about half of the land included under the new lease.

[32] Meinhard v. Salmon, 223 App. Div. 663, 229 N. Y. Supp. 345 (1st Dep't 1928).

[33] *Supra* note 4.

[34] Douglas, *Vicarious Liability and Administration of Risk II* (1929) 38 YALE L. J. 720.

[35] The majority had no difficulty in deciding that the defendant was bound by as high a standard of conduct as a partner. *Cf.* Jansen v. Bellamore, 147 La. 900, 86 So. 324 (1920).

partner is permitted; and that the facts here presented are more closely analogous to the purchase of the reversion than to the renewal of a lease. In contrast to this "graft upon the old stock" argument the majority stresses the obligations which arise out of the relation of confidence, impliedly denying the validity of the distinction in the purchase of the reversion, and concluding:

"A managing coadventurer appropriating the benefit of such a lease without warning to his partner might fairly expect to be reproached with conduct that was underhand, or lacking, to say the least, in reasonable candor, if the partner were to surprise him in the act of signing the new instrument. Conduct subject to that reproach does not receive from equity a healing benediction."

The final question raised by the case is the proportion in which the plaintiff shall share in the new lease. The decided cases in which the renewal included additional lands are few. In all of them the problem of separating the old land from the new was simple, and it was held without hesitation that the trust extended only to the land comprised in the original lease.[36] It has been intimated,[37] however, that if the separation could not fairly be made the one responsible for the "confusion" would suffer the resulting inconvenience. In the instant case a physical division of the land was clearly impracticable and an accurate division of interests on the basis of the proportional value contributed by each piece of land was impossible. The final decision seems the fairest possible solution of a difficult problem.

BANK'S PRIVILEGE TO SET OFF DEPOSITS AGAINST INSOLVENT DEBTOR

An interesting problem concerning a bank's privilege of set-off was raised in the recent case of *Kolkman v. Manufacturers' Trust Co.*[1] An insolvent New York corporation, in order to prefer the bank to which it was indebted on unmatured promissory notes, deposited funds making its total deposit sufficient to cover a check which it immediately thereafter drew to the bank's order in settlement of its indebtedness. The bank throughout was admittedly completely ignorant of the preferential character of the transaction. Five days later voluntary proceedings in bankruptcy were instituted. The trustee in bankruptcy sued to recover the payment as constituting a violation of section 15 of

[36] Acheson v. Fair, 3 Drury & Warren 512 (1843) (case of trustee); O'Brien v. Egan, *supra* note 7 (case of life-tenant).

[37] Acheson v. Fair, *supra* note 36, at 525.

[1] 27 F. (2d) 659 (C. C. A. 2d, 1928), *rev'g* 21 F. (2d) 760 (S. D. N. Y. 1927).

the New York Stock Corporation Law,[2] declaring invalid any "conveyance, assignment or transfer of any property of any such corporation" or "any payment made, judgment suffered, lien created, or security given by it . . . when the corporation is insolvent . . . with the intent of giving a preference to any particular creditor over other creditors of the corporation."

The striking feature of the Stock Corporation Law is that a transfer may be declared void although the creditor had no reasonable cause to believe that any preference was being effected.[3] On the other hand, under section 60 (b) of the Bankruptcy Act such cause is a prerequisite to a voidable preference.[4] The bank relied upon this and asserted its right to set off the funds under section 68 (a) of the Bankruptcy Act,[5] providing for a set-off of "mutual debts and credits." The court held that the trustee should recover so much of the deposit, made with intent to create a preference, as was necessary to cover the check to the bank.

Ordinarily a bank may apply a bankrupt customer's deposits received in the usual course of business to the satisfaction of his matured indebtedness by means of set-off.[6] And this may be done even during the four months' period prior to the filing

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[2] N. Y. ANN. CONS. LAWS (Cum. Supp. 1924) c. 59.

[3] Grandison v. Robertson, 231 Fed. 785 (C. C. A. 2d, 1916); Baker v. Emerson, 4 App. Div. 348, 38 N. Y. Supp. 576 (Sup. Ct. 1896).

[4] 36 STAT. 842 (1910), 11 U. S. C. § 96 (b) (1926): "and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee. . . ."

[5] 30 STAT. 565 (a) (1898), 11 U. S. C. § 108 (a) (1926): "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

[6] New York Co. Nat. Bank v. Massey, 192 U. S. 138, 24 Sup. Ct. 199 (1903); BLACK, BANKRUPTCY (4th ed. 1926) § 634; COLLIER, BANKRUPTCY (13th ed. 1923) 1612.

When the set-off is made after the bankruptcy in accordance with section 68 (a) of the Bankruptcy Act, it will only apply as to those funds which were on deposit at the time the petition in bankruptcy was filed. Funds later deposited, though neither party knew of the filing of the petition, are not included. In re Michaelis & Lindeman, 196 Fed. 718 (S. D. N. Y. 1912). Trust funds may not be set off against the indebtedness of the trustee, if the bank has knowledge of facts sufficient to put it on notice of the cestui's interest. American Trust & Banking Co. v. Boone, 102 Ga. 202, 29 S. E. 182 (1897). Otherwise, such set-off may be made. Denton Nat. Bank v. Kenney, 116 Md. 24, 81 Atl. 227 (1911); see Note (1925) 38 HARV. L. REV. 800. As to what constitutes notice, see (1921) 5 MINN. L. REV. 470. Thus, the Massey case has been criticized on the ground that the usual understanding of all parties concerned is that a deposit of money creates a fiduciary instead of a debtor-creditor relationship. See Comment (1916) 10 ILL. L. REV. 602.

of the petition in bankruptcy provided that the bank did not acquire the claim for this specific purpose.[7] Where there has been collusion between the bank and the customer, so that the deposit has in fact been built up to enable the bank to exercise its set-off, it will not be permitted.[8]

The holding of the instant case, that "the deposit itself was affected with the statutory invalidity" differs from the result generally reached in construing the similar wording of § 60 (b), namely, that a mere deposit of funds is not such a "transfer" as to affect a preference,[9] the essential element of a diminution of the estate being absent.[10] But in construing this same wording, the problem as to the effect of payment by check to a drawee bank during the four months' period has presented issues of greater difficulty. A check drawn in favor of a bank having no reasonable cause to believe a preference will be effected by its receipt, will not be declared a voidable preference within the terms of the Act,[11] even though the payment be in settlement of unmatured obligations.[12] When a bank accepts the customer's check drawn upon it, and it has reasonable cause to believe that a preference will be affected, courts differ as to the effect of the transaction. Some courts hold that it constitutes a preference, and not only is the payment by check voidable, but the bank's set-off is thereafter automatically precluded, notwithstanding the fact that if the bank had merely set off the funds on deposit

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[7] Studley v. Boylston Nat. Bank, 229 U. S. 523, 33 Sup. Ct. 806 (1912); American Bank & Trust Co. v. Coppard, 227 Fed. 597 (C. C. A. 5th, 1915); Booth v. Prete, 81 Conn. 636, 71 Atl. 938, 20 L. R. A. (N. S.) 863 (1909); see Eager, *Set-Off of Bank Deposit against Indebtedness under the Bankruptcy Act* (1924) 10 VA. L. REV. 575.

[8] First Nat. Bank of El Centro v. Harper, 254 Fed. 641 (C. C. A. 9th, 1918).

[9] N. Y. Co. Nat. Bank v. Massey, *supra* note 6; In re Radley Steel Construction Co., 212 Fed. 462 (E. D. N. Y. 1914).

[10] "A deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor, for when he parts with the money he creates, at the same time, on the part of the bank, an obligation to pay the amount of the deposit as soon as the depositor may see fit to draw a check against it." New York Co. Nat. Bank v. Massey, *supra* note 6, at 147, 24 Sup. Ct. at 201.

[11] Wrenn v. Citizens' Nat. Bank, 96 Conn. 374, 114 Atl. 120 (1921); American Bank & Trust Co. v. Coppard, *supra* note 7; *cf.* Studley v. Boylston Nat. Bank, *supra* note 7.

It has sometimes been felt that the courts have been too ready to be convinced of the innocence of the bank in such situations, it being considered that banks are not only in an advantageous position to follow the financial fortunes of their customers, but that it is also distinctly to their welfare to do so. See Chumbley, *Bank's Right of Set-Off in Bankruptcy* (1927) 13 VA. L. REG. (N. S.) 137.

[12] *Cf.* Putnam v. United States Trust Co., 223 Mass. 199, 111 N. E. 969 (1916).

against their claim, the set-off would have been allowed.[13] Others, relying upon a famous dictum that "there is nothing in 68 (a) which prevents the parties from voluntarily doing before the petition is filed, what the law itself requires to be done after proceedings in bankruptcy are instituted" [14] uphold such a payment by check,[15] as merely another method of accomplishing the set-off.[16] But as maturity of the items is ordinarily considered a prerequisite to a bank's privilege of set-off before bankruptcy,[17] a check to a bank in payment of an unmatured obligation under such circumstances would surely be invalid.[18] After bankruptcy, of course, an unmatured item may be set off under 68 (a) as a "provable claim." [19]

Although the decision under the state statute is probably contrary to that which would have obtained under the federal Act, there would seem to be no constitutional question involved for the instant provision is merely a fraudulent transfer enactment. Section 67 (e) of the federal Act providing that the trustee in bankruptcy may "avoid any transfer which any creditor of such bankrupt might have avoided" is construed to mean any transfer

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[13] In re Starkweather & Albert, 206 Fed. 797 (W. D. Mo. 1913); Knoll v. Commercial Trust Co., 249 Pa. 197, 94 Atl. 750 (1915); In re National Lumber Co., 212 Fed. 928 (C. C. A. 3d, 1914).

[14] Studley v. Boylston Nat. Bank, *supra* note 7, at 528, 33 Sup. Ct. at 808.

[15] Toof v. City Nat. Bank, 206 Fed. 250 (C. C. A. 6th, 1913); Jandrew v. Guaranty State Bank, 294 Fed. 530 (C. C. A. 5th, 1923); Drugan v. Crabtree, 299 Fed. 115 (C. C. A. 4th, 1924); Comment (1917) 15 MICH. L. REV. 249; (1913) 12 MICH. L. REV. 50; (1925) 22 MICH. L. REV. 836; see COLLIER, *op. cit. supra* note 6, at 1615.

[16] Wilson v. Citizens' Trust Co., 233 Fed. 697 (S. D. Ga. 1916); REMINGTON, BANKRUPTCY (3d ed. 1923) § 1463.

[17] COLLIER, *op. cit. supra* note 6, at 1613.

In some jurisdictions, equity may under special circumstances allow a set-off of unmatured items that would not be allowed at law. Where such a rule prevails, insolvency is generally considered such a circumstance. Wunderlich v. Merchants' Nat. Bank, 109 Minn. 468, 124 N. W. 223, 27 L. R. A. (N. S.) 811 (1910); Kentucky Flour Co.'s Assignee v. Merchants' Nat. Bank, 90 Ky. 225, 13 S. W. 910 (1890). See Note (1910) 25 L. R. A. (N. S.) 393, where it is suggested that dealings between banks and depositors are such as especially to lend themselves to this special equity rule. But see Homer v. Nat. Bank of Commerce, 140 Mo. 225, 41 S. W. 790 (1897).

Where a set-off is permitted in such a jurisdiction, the insolvent depositor cannot sue for damages upon dishonor of his checks. Parker v. First Nat. Bank, 96 Okla. 70, 220 Pac. 39 (1923); (1924) 10 VA. L. REV. 396.

As to the general problem, see Clark, *Set-Off of Immature Claims In Insolvency* (1920) 34 HARV. L. REV. 178; (1913) 77 CENT. L. J. 271; (1915) 81 CENT. L. J. 318; (1916) 2 IOWA L. BULL. 36.

[18] Ridge Ave. Bank v. Studheim, 145 Fed. 798 (C. C. A. 3d, 1906).

[19] In re Philip Semmer Glass Co., 135 Fed. 77 (C. C. A. 2d, 1905); Germania Savings Bank & Trust Co. v. Loeb, 188 Fed. 285 (C. C. A. 6th, 1911).

that might have been avoided under the laws of the state where the transaction occurred.[20] Fraudulent transfers as defined by local law are thus given effect, though the transfer may involve different elements than those involved in preferential transfers under the federal Act.[21]

The result of the instant case has been achieved in the absence of such a state statute by means of the "trust fund" theory of corporate assets, where the bank actually "did not change its position" because of the particular deposit.[22] If such "change" had been made, the bank would have been protected as a bona fide transferee for value, which class also received protection under the New York Stock Corporation Law.[23]

The phase of the case of perhaps the most difficulty relates to the allocation of the untainted deposit to the check given to the bank. The check was for $5,000. At the time it was drawn it appears there were about $3,500 of deposits made with no intent to prefer and $6,000 in deposits added with the intention of preferring the bank and other creditors. At the time of the filing of the petition in bankruptcy, approximately $200 remained. By an application of the rule in *Clayton's Case*,[24] that the money first deposited is deemed to be the first drawn out, the result obtained by the court would follow, since the check to the bank was the first paid after the preferential deposit. Thus a set-off was allowed to the extent of the original deposits.[25]

If the checks of the bankrupt presented to the bank for payment after the deposit of the $6,000 were all drawn with the

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[20] Baldwin v. Kingston, 247 Fed. 163 (D. N. J. 1918); Manders v. Wilson, 230 Fed. 536 (N. D. Cal. 1915).

[21] In re Zabawski, 283 Fed. 552 (E. D. Mich. 1922); Anderson v. Gray, 284 Fed. 770 (C. C. A. 5th, 1922). This is true not only in that the state statute disregards the intent of the creditor, but also in that the state statute makes no provision for a time limitation, which would seem to lend itself to much business instability.

[22] Woods v. Metropolitan Nat. Bank, 126 Wash. 346, 218 Pac. 266 (1923).

[23] "No such conveyance, assignment or transfer shall be void in the hands of a purchaser for a valuable consideration without notice." N. Y. STOCK CORPORATION LAW § 15. In the instant case it was contended that the bank was a purchaser for value of the check, in that it had lost the indorsers on the corporation's note for failure to make presentment and give notice of dishonor. But the court held that the indorsers by participating in the preferential transfer had waived the requirements of notice, and were still responsible. For a discussion of this point see (1929) 38 YALE L. J. 817.

[24] 1 Mer. 572 (1816); (1923) 23 COL. L. REV. 488; Note (1914) 28 HARV. L. REV. 194.

[25] Had there been additional deposits and drawings, a situation might easily have been presented where, by an application of this presumption, the entire payment to the bank would have been protected. Or in a different situation, the entire payment could have been invalid, that is, if other creditors had presented their checks first so as to deplete the original deposit, there being only tainted funds left.

intent of effecting preferences, the application of the rule in *Clayton's Case* might be justified on grounds of expedience since the payments would all be on the same footing. But if, as may have been the case, some of the checks paid by the bank after the $6,000 deposit were previously outstanding or were not intended to effect preferences, the rule in *Clayton's Case* would seem not to be applicable. Since the problem is in effect one of tracing trust funds, it would seem more appropriate to consider the applicability of the rule in *Knatchbull's* case,[26] namely, that when a wrongdoing trustee deposits trust funds in his personal account, his subsequent drawings are first allocated to non-trust deposits. But the rule in *Knatchbull's* case would not apply, since in the instant case the problem is not limited to tracing trust funds into the trustee's personal account. Rather it is a matter of tracing the trust money through the account into the hands of the one receiving payment. Independently of the presumption of either *Clayton's Case* or *Knatchbull's* case this would ordinarily be possible where the preferred creditor was aware of the breach of trust,[27] or as here, where by virtue of the statute, the intent of the creditor is immaterial. In order to trace the trust funds to the payment of the bank's check, however, it is necessary to establish an intent on the part of the bankrupt to have the check paid out of the preferential deposit. The court assumed that there was an intent to pay the check out of the preferential deposit only to the extent that the deposit was necessary to make good the check to the bank. While it may be true that no other intent could have been shown in the instant case, cases can be imagined where such an intent could be readily proved, for example where there were outstanding checks to the amount of the original deposit before the preferential deposit was made.

The court evidently intended to put the parties in *statu quo*. The check was set aside. But the privilege of set-off had not existed at the time of the payment by check, since the obligation of the bankrupt was still unmatured,[28] whereas the privilege of set-off allowed by the court did not exist until the obligation was

[26] Knatchbull v. Hallett, 13 Ch. D. 696 (1879); see Scott, *The Right to Follow Money Wrongfully Mingled With Other Money* (1913) 27 HARV. L. REV. 125; Comment (1923) 32 YALE L. J. 265; *cf.* In re Oatway, [1903] 2 Ch. 356.

[27] Ames, *Following Misappropriated Property Into Its Product* (1906) 19 HARV. L. REV. 511.

[28] The instant case would thus seem to overrule in part the case of Irish v. Citizen's Trust Co., 163 Fed. 880 (N. D. N. Y. 1908), where, in a similar situation, set-off was not permitted on the unmatured indebtedness, "status quo" being there considered as of the time the payment by check was made. The Irish case was not mentioned in the instant decision. *Cf.* also Ridge Ave. Bank v. Studheim, *supra* note 18 (similar holding involving § 60 (a) of the Bankruptcy Act).

matured by bankruptcy. The effect given to the check thus insured to the bank the possession of the money after bankruptcy, which it might otherwise have been unable to retain. A ready means is thus provided a bankrupt depositor to prefer a creditor bank as to unmatured obligations. It would seem important therefore to ascertain whether there were in fact subsequent drawings or attachments which, but for the check, would have deprived the bank of the possession of the money which it was allowed to set off. The court's seeming unwillingness to penalize a bank by enforcing the statute strictly raises at least a doubt as to the desirability of the New York statute as a matter of policy.[29]

POWERS OF TRUSTEES TO EXECUTE LONG TERM LEASES

If a trustee has a legal estate in fee simple, he has the power to execute a lease for any term of years, regardless of the length of such term to a lessee without notice of the trust.[1] If the lessee were a bona fide purchaser for value, he would be protected as against any claim of the cestui que trust. As a practical matter, however, the lessee generally has notice of the trust, and the question usually arising is as to the length of term for which the trustee may lease the trust property so as to bind the trust estate without being guilty of a breach of trust.

Aside from the power of a trustee who has a legal estate in fee simple to convey for any term of years to a bona fide purchaser for value, and thus to bind the estate, there is no substantial distinction between the powers of such trustee and those of one who has the legal title only for the lives of the cestuis que trust. In

[29] *Cf.* Irish v. Citizen's Trust Co., *supra* note 28, where set-off was allowed the innocent bank on matured indebtedness although the Stock Corporation Law had been violated. It was stated at 890: "Can we impose a penalty on the trust company for the reason the furniture company (insolvent corporation depositor) had an intent to prefer not known to or shared or participated in by the trust company?"

"We would thus have the spectacle of a court penalizing a bank innocent of guilty knowledge or wrongdoing for a transaction consonant with the usual and orderly course of a banking business. I am of the opinion that the legislature of New York never intended that section 66 (now section 15) should be tortured to accomplish such a result." Howland v. Metropolitan Bank, 228 Fed. 542, 546 (S. D. N. Y. 1915).

[1] 1 WASHBURN, REAL PROPERTY (6th ed. 1902) § 629; Greason v. Keteltas, 17 N. Y. 491 (1858). A lease for any number of years is not in violation of the rule against perpetuities, since the lessor is not thereby precluded from disposing of the property at will, nor is the lessee hindered in assigning the lease; and by uniting in a conveyance, the lessor and the lessee may freely and without restraint convey both the fee and the leasehold interest. Todhunter v. Des Moines R. R., 58 Iowa 205, 12 N. W. 267 (1882); Sioux City Terminal R. R. v. Trust Co., 82 Fed. 124 (C. C. A. 8th, 1897).

either case the trustee's control of the property is limited, and the trustee who holds the fee is no more privileged in equity to wrest the right to manage the property from those entitled thereto at the termination of the trust than is the trustee whose legal title is limited to the lives of the cestuis or of any other persons. Therefore, as should be expected, the courts make no distinction between the trustee who has a legal title in fee simple and one who has the legal estate only for the life of a third person, with respect to their powers of executing leases which will not constitute breaches of trust.[2] The generally accepted theory seems to be that the estate of a trustee who is to receive rents and profits, and to pay or apply them to the use of another for life, is in the nature of an estate *pur autre vie*.[3] The validity of the lease depends not on the extent of the trustee's legal estate, but on the extent of his power.

I

POWER TO EXECUTE LONG TERM LEASES WITHOUT APPLICATION TO A COURT OF EQUITY

The question of the power of a trustee to make any lease at all, as well as of his power to make long term leases, is primarily a question of the intention of the settlor of the trust. This intention is to be ascertained by a construction of the whole instrument creating the trust, with reference to the surrounding circumstances, such as the character of the property and of the neighboring property; the desirability of securing a fair income, the customary length of leases in the particular locality, and like propositions. Where the trust is passive, there can be no implied power to lease,[4] and there is no such power where the instrument

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[2] In re Hubbell Trust, 135 Iowa 637, 113 N. W. 512 (1907) (trustee with fee held to have no power to bind remaindermen); Ohio Oil Co. v. Daughetee, 240 Ill. 361, 88 N. E. 818 (1909) (trustee with fee held not to have power to make oil leases for five years "and as much longer as gas and oil should be found in paying quantities"). But see Kales, *Power in Trustees to Make Leases* (1913) 7 ILL. L. REV. 427, 428. Only one case has been found supporting the proposition that the trustee who has a fee may, without breach of trust, execute a lease which extends not unreasonably beyond the term of trust. Hines v. McCombs, 2 Ga. App. 675, 58 S. E. 1124 (1907) (two-year lease executed by a trustee with the fee permitted to continue after termination of the trust).

[3] Losey v. Stanley, 147 N. Y. 560, 42 N. E. 8 (1895); In re Armory Board, 29 Misc. 174, 60 N. Y. Supp. 882 (Sup. Ct. 1899); In re Hubbell Trust, *supra* note 2.

A statute in New York vests the legal estate in the remainderman upon the death of the person whose life determines the trust. N. Y. REAL PROPERTY LAW (1909) § 109.

[4] Hefferman v. Taylor, 15 Ont. 670 (1888).

creating the trust indicates a contrary intention.[5] If the trust instrument expressly grants power to lease for a certain term, there can be no implied authority to grant a lease for a longer term, for this would be to deviate from the limitations of the grant.[6] But although a lease for a longer term than is permitted by an express provision in the trust instrument is void at law, it is valid in equity for the term of years corresponding with the power, and is void only as to the excess.[7]

Where the words of the trust instrument show an intention of the trustor that the trustee should have extensive powers of leasing the trust property, the trustee may execute long term leases. Thus when the trustee is given power "to dispose of any of my real estate in fee simple, or for a term of years, or otherwise, in as full and large a manner in every respect as I could myself, if living," [8] or "to lease any portion of said real estate for such period, and upon such terms and conditions, as they shall think best," [9] such trustee has almost unlimited power in the matter of executing leases, subject to the condition, of course, that he must act in good faith for the best interests of the estate.

A trustee who is charged with the receipt and disposal of the income from trust property must necessarily be impliedly authorized to make leases for reasonable periods and at reasonable rents, in the absence of any express provision to that effect in the declaration of trust.[10] Such authority is necessary in order that an income may be obtained from the property. The question as to whether the lease is a reasonable one, if not to be ascertained

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[5] Evans v. Jackson, 6 L. J. Ch. 8 (1837) (testator bequeathed leaseholds to trustees to sell; being unable to find a purchaser, the trustees agreed to grant an underlease to *A*, but *A* upon discovering the trust for sale, refused to accept; bill by trustees against *A* for specific performance was dismissed).

[6] Bowes v. East London Co., Jac. 324 (1821). A power to make leases "for twenty-one years from the making thereof" does not permit execution of a lease for 21 years to begin in futuro. Griffen v. Ford, 14 N. Y. Super. Ct. 123 (1851).

[7] In re Hubbell Trust, *supra* note 2; Hubbell v. Hubbell, 172 Iowa 538, 154 N. W. 867 (1915); Griffen v. Ford, *supra* note 6.

[8] Prather v. Foote, 1 Disn. 434 (Ohio 1837) (99-year lease).

[9] Goddard v. Brown, 12 R. I. 31 (1878).

[10] Hedges v. Riker, 5 Johns Ch. 163 (N. Y. 1821); Black v. Higon, Harp. Eq. 205 (S. C. 1824); Leggett v. Perkins, 2 N. Y. 296 (1849); Newcomb v. Keteltas, 19 Barb. 608 (N. Y. 1855); Greason v. Keteltas, *supra* note 1; City of Richmond v. Davis, 103 Ind. 449, 3 N. E. 130 (1885); Matter of Odell's Estate, 4 N. Y. Supp. 463 (Surr. Ct. 1888); Miller v. Smythe, 92 Ga. 154, 18 S. E. 46 (1893); Hale v. Hale, 146 Ill. 227, 33 N. E. 858 (1893); Corse v. Corse, 144 N. Y. 569, 39 N. E. 630 (1895); Hutcheson v. Bennefield, 115 Ga. 990, 42 S. E. 422 (1902); In re Hubbell Trust, *supra* note 2; Naylor v. Arnitt, 1 Russ. & M. 501 (1830); Fitzpatrick v. Waring, 11 L. R. Ir. 35 (1882); Brooke v. Brown, 19 Ont. 124 (1890); 1 TIFFANY, REAL PROPERTY (2d ed. 1920) 1060.

from the trust instrument itself, must of necessity depend upon the nature of the property, the use to be made of it, the income to be derived therefrom, the local customs in renting, and the improvements which may be contracted to be made by the lessee.[11] The period, then, is reasonable if the lease for such period appears to be essential or desirable in order that the purpose of the settlor in creating the trust may be effected. It seems that a provision in the trust instrument for a general power to lease, without stating the term which may be granted, adds nothing to the implied power of the trustee to execute a reasonable lease, and that the same limitations upon his power exist in either case.

If a lease granted by a trustee accords with the custom of the place, is reasonable and usual as to its duration, and the amount of rental stipulated to be paid is, under all the circumstances at the time of the execution of the lease, fair and adequate compensation, such lease will be upheld as within the power of the trustee.[12] But, on the other hand, if, under all the circumstances, the duration of the lease is for an unreasonable length of time, although it may be within the period for which the trust is to continue, or for a stipulated rent which is inadequate, or for any other sufficient reason it was not for the best interest of the trust estate that the lease should have been granted, a court of equity might set aside the lease as an abuse of power on the part of the trustee.[13] The trustee must act with as great fidelity toward the remainderman who will receive the title upon the termination of the trust as toward the beneficiaries who may be entitled to the rents and profits during the existence of the trust.[14]

The extent of the power, apart from any express provision in the trust instrument, to make a lease which will be valid and binding even after the termination of the trust, is a question upon which the decisions are not entirely in accord. The law of England is regarded as settled that trustees without express authority may not execute leases for terms which are likely to extend beyond the trust period; and there is considered to be a further limitation on their power when there is a possibility, albeit remote, that the lease may so extend.[15]

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[11] In re Hubbell Trust, *supra* note 2.

[12] Hutcheson v. Bennefield, *supra* note 10.

[13] *Cf. ibid.*

[14] In re Hubbell Trust, *supra* note 2.

[15] In re Shaw's Trust, L. R. 12 Eq. 124 (1871) (application for approval of a ten-year lease denied; term reasonable under circumstances; possibility of extension beyond trust period remote); Wood v. Patteson, 10 Beav. 541 (1847). But *cf.* Naylor v. Arnitt, *supra* note 10 (lease for ten-year term held valid); and see Attorney General v. Owen, 10 Ves. 555, 560 (1805) (test of reasonableness of duration of the lease applied).

An Irish case, Fitzpatrick v. Waring, *supra* note 10, held that the lease

There are some American decisions which recognize the power of a trustee to execute a lease extending beyond the term of the trust, although the terms of the trust instrument did not expressly authorize him to make such a lease.[16] But with the exception of an early case,[17] all the New York decisions are to the effect that the trustee without express authority, or authority of an equitable decree, has no power to lease real property for a period reasonably certain to extend beyond the term of the trust,[18] and even if the period of the lease at the time of its execution was not likely to extend beyond the trust term, when the trust does terminate before the lease, the balance

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was binding on the persons entitled to the trust property upon the termination of the trust.

A Canadian case, Brooke v. Brown, *supra* note 10, upheld the power of trustees, where there was express power absolutely to convey the property, to execute a building lease for 21 years, with provision for compensation to lessee at end of term for improvements made, or renewal for a like term.

[16] Collins v. McTavish, 63 Md. 166 (1885); Collins v. Foley, 63 Md. 158 (1885); Sweeney v. Hagerstown Trust Co., 144 Md. 612, 125 Atl. 522 (1924). In the first two cases the trustee was empowered to make such change of investment of the estate as seemed advantagous, and it was held that an agreement to lease, renewable forever, was within the trustee's power. The third case cannot be put upon such express power, but it was held that a five-year lease was valid even beyond the termination of the trust period because the term was customary and necessary to secure a fair income from the property and did not extend beyond the period during which the trust was likely to continue, since the beneficiary had an expectancy of eight years at the time the lease was executed. *Accord:* Hines v. McCombs, *supra* note 2 (two-year farming lease executed by trustee held not terminated upon expiration of the trust).

Bergengren v. Aldrich, 139 Mass. 259, 29 N. E. 667 (1885) determined that a renewal agreement cannot bind remainderman. *Accord:* Gomez v. Gomez, 147 N. Y. 195, 41 N. E. 420 (1895). But see Sweeney v. Hagerstown Trust Co., *supra* at 622, 125 Atl. at 526.

Where valuable improvements have been made by a lessee, under a long term lease by a trustee whose trust estate was likely to continue beyond the period of the lease, it has been held that the lessee was entitled to possession for the balance of the term. Butler v. Topkis, 63 Atl. 646 (Del. Ch. 1906).

[17] Greason v. Keteltas, *supra* note 1. In In re Hubbell, *supra* note 2, at 655, 113 N. W. at 519, it was said concerning the Greason case: "Though the trust period had not expired and the decision might have been planted on some other ground, this case seems to fairly determine that trustees for a long time can execute leases which may extend beyond the trust period, though later opinions of the courts of that state cast some doubt on what was really decided."

[18] Matter of Opening of One Hundred and Tenth Street, 81 App. Div. 27, 81 N. Y. Supp. 32 (1st Dep't 1903), *aff'd*, 179 N. Y. 572, 73 N. E. 1127 (1904) (trustee executed lease for 20 years at a time when the beneficiary, whose life determined the trust, was 66 years of age); Matter of Armory Board, *supra* note 3; Tredwell v. Tredwell, 86 Misc. 104, 148 N. Y. Supp. 391 (Sup. Ct. 1914); Corse v. Corse, *supra* note 10.

of the lease is defeated.[19] The lease is valid, however, so long as the trust continues, the lease terminating upon the expiration of the trust.[20]

Aside from the few cases in Maryland [21] and Delaware,[22] the weight of authority supports the rule that, in the absence of express authority therefor, conferred upon the trustee by the trust instrument, the trustee is without power to lease the trust property for a term extending beyond the life of the trust, and that where, nevertheless, the trustee makes a lease which continues beyond the trust term, the excessive period—*i.e.*, the period which extends beyond the termination of the trust—will be void.[23] The reason for the rule is said to be that the trustee has no power to prevent the beneficiaries of the trust from enjoying the estate as contemplated in the trust instrument, when the trust is terminated.[24]

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[19] Matter of McCaffrey's Estate, 50 Hun 371, 3 N. Y. Supp. 96 (Sup. Ct. 1888); Weir v. Barker, 104 App. Div. 112, 93 N. Y. Supp. 732 (2d Dep't 1905); Aimone Mfg. Co. v. Schultz, 210 App. Div. 41, 205 N. Y. Supp. 170 (1st Dep't 1924).

[20] See N. Y. REAL PROPERTY LAW (1909) §§ 106, 107. In construing these sections, it was said in Weir v. Barker, *supra* note 19, that the legislative intent was to extend, rather than to restrict, the powers of a trustee. It was there held that a five-year lease with option in lessee to renew was not void as between lessee and trustee, with respect to the renewal period, although there had been no application to the court for authority to execute the lease.

[21] *Supra* note 16.

[22] *Supra* note 16. In Crown Co. v. Cohn, 88 Ore. 642, 172 Pac. 804 (1918), the trustees leased the trust property for thirty years at a time when the youngest trustee had an expectancy of 28.18 years. The trust was to continue until the death of the last of five trustees. It was held that there was an implied power to lease upon such terms and conditions as usually prevail in the city in which the land is situated and that the lease would not be rescinded at the instance of the lessees merely because the period of the lease was slightly in excess of the anticipation of life of the youngest trustee. The court, however, did not say that the lease would not expire upon the termination of the trust period.

[23] South End Warehouse Co. v. Lavery, 12 Cal. App. 449, 107 Pac. 1008 (1910); Hunt v. Lawton, 245 Pac. 803 (Cal. 1926); Standard Metallic Paint Co. v. Prince Mfg. Co., 133 Pa. 474, 19 Atl. 411 (1890) (30-year lease); St. Louis Trust Co. v. Van Raalte, 214 Mo. App. 172, 259 S. W. 1067 (1923) (99-year lease and the expectancy of the person whose life determined the trust was 40 years); Cox v. Kinston Co., 175 N. C. 299, 95 S. E. 623 (1918); Pa. Horticultural Soc. v. Craig, 240 Pa. 137, 87 Atl. 678 (1913) (30-year lease).

[24] Cox v. Kinston Co., *supra* note 23.

No application to the court is necessary under the statute if there is an express power given to the trustee by the terms of the trust instrument to lease for a term extending beyond the termination of the trust. Raynolds v. Browning, King & Co., 123 Misc. 367, 205 N. Y. Supp. 748 (Sup. Ct. 1924), *aff'd*, 217 App. Div. 443, 217 N. Y. Supp. 15 (1st Dep't 1926).

II

POWER TO EXECUTE LONG TERM LEASES UPON APPLICATION TO A COURT OF EQUITY

It frequently happens that the character of the trust property and of the particular locality has changed, since the creation of the trust, to such an extent that leases of moderate duration which formerly would yield a profitable income for the beneficiaries, will no longer bring such income to the estate, and that only leases for long terms can be profitably negotiated. The buildings may have become delapidated and the estate may not have sufficient funds to replace the structures. A lessee must be granted a long term lease if he contemplates construction of a building of any consequence upon the premises, and such long term must be free from the contingency of premature termination. Thus there must be some means by which the trust property may be made productive of income to the estate in such instances, and this can be done only by removing the legal disability of the trustee to execute leases which will be valid after the termination of the trust.

The New York statute was enacted for the purpose of providing a means by which the lessee may have the power to make a valid lease the duration of which will not be determined by the termination of the trust.[25] The statute provides that, upon application to the supreme court therefor, that court may by order authorize a trustee who holds real property during the life of a beneficiary for the purpose of applying the rents and profits for the use of such beneficiary, to lease such property for a term exceeding five years, "if it appears to the satisfaction of the court that it is for the best interest of the trust estate." [26]

[25] N. Y. REAL PROPERTY LAW (1909) §§ 106, 107. "It was undoubtedly the settled law of this state at the time of the original passage of the act in question in 1895 that such lease was not binding on remaindermen, but was valid only for a period ending with the trust term." Weir v. Barker, *supra* note 19, at 115, 93 N. Y. Supp. at 734. "The statute as thus amended was clearly an enabling statute . . . the Legislature having attempted to make leases executed in the manner provided valid and binding upon remaindermen after the expiration of the trust term so far as it had the power to do so. It is unnecessary to determine now to what extent the Legislature has succeeded in that purpose . . . ." *Ibid.* 119, 93 N. Y. Supp. at 737. See Aimone Mfg. Co. v. Schultz, *supra* note 19, at 46, 205 N. Y. Supp. at 173.

[26] In Weir v. Barker, *supra* note 19, it was held that application to the court was unnecessary to the validity of a lease for a term of five years, with the option to the lessee to renew for another period of five years, and that such application is necessary under the statute only in order to validate that portion of the term which may extend beyond the termination of the trust. But in Thirty-nine Cortlandt St. Corp. v. Lambert, 209 App. Div. 575, 580, 205 N. Y. Supp. 161, 164 (1st Dep't 1924), it was said that the statute". . . must be construed to mean that a trustee who

In other jurisdictions where the question has arisen, the same result as has been provided for in New York has been reached without such a statutory provision. The courts are not all in accord as to what are the prerequisites in order that a decree by a court of equity may be obtained authorizing a long term lease. All that is necessary in some jurisdictions is that the proposed lease must be manifestly for the benefit of all parties concerned, and that those of such parties who were capable of consenting gave their consent.[27] And in such cases a decree authorizing such lease is binding upon beneficiaries not in being, if their interests are identical with those of persons in being who are before the court.[28]

The Wisconsin[29] and Illinois[30] courts have gone far in exer-

would make a lease must limit the term to five years or obtain the court's order for the execution of a lease of longer term."

Since the statute refers only to trusts in which the trustee holds the property during the life of a beneficiary, query as to whether the court would authorize a lease extending beyond the trust term, in a case where the trustee holds during the life of a person other than the beneficiary.

[27] Waddell v. United Cigar Stores, 195 N. C. 434, 142 S. E. 585 (1928). But here although the lease was for a term of thirty years, the expectancies of the beneficiaries, whose lives determined the existence of the trust, were greater than the term of the lease.

A court of chancery has general supervision over trust estates, and may direct such a disposition as, in its discretion, seems beneficial to all parties interested. Hale v. Hale, *supra* note 10 (a sale); Gavin v. Curtin, 171 Ill. 640, 49 N. E. 523 (1898) *semble*.

[28] Denegre v. Walker, 214 Ill. 113, 73 N. E. 409 (1905).

[29] Upham v. Plankinton, 152 Wis. 275, 140 N. W. 5 (1913). A 99-year lease was authorized by the court. The considerations which influenced the court were: that the particular realty was of a kind which could most profitably be handled by long term leases; that a 99-year lease, so common in large cities, was within all reasonable limitations under the circumstances; and that such broad powers of "entire control, management, and charge of the estate" had been committed to the trustees. It was said for the majority, *supra* at 293, 140 N. W. at 12: "So in matter of administration, out of the ordinary, as in this case, the court must stand in place of the creator of the trust, as near as may be, and speak by his implied directions under the new conditions." Two of the justices dissented on the ground that when power to lease is either expressly or impliedly conferred, the duration of such lease is measured by the length of the trust period, and here the trust period ended with the death of a beneficiary whose expectancy at the time of execution of the lease was 16 years, and thus the decision of the majority deprived the remaindermen of possession.

[30] Denegre v. Walker, *supra* note 28 (99-year lease authorized when trust was to terminate within eight months, although possibility that the time of distribution might be delayed because of suits pending against the settlor's estate); Marsh v. Reed, 184 Ill. 263, 56 N. E. 306 (1900) (settlor had expressly provided that no lease should be for a longer term than ten years; decree granted for the execution of a 99-year lease; all adult beneficiaries consenting and it being shown that such lease was necessary to effectuate the design of the donor); *cf.* Packard v. Illinois Trust & Sav.

cising equitable jurisdiction to authorize long term leases, for the reason merely that the lease is beneficial to the trust estate, or a good business venture, though not of underlying necessity for the preservation of the estate. On the other hand, the majority of the cases in which application to courts of equity has been made for authority to execute long term leases have held that the duration of the trust ordinarily limits the term for which such property may be leased by the trustees, and to take the particular case out of that rule, there must be shown to exist an exigency rendering an execution of a long term lease reasonably necessary for the preservation of the property, or for effectuating the intention of the trustor with regard to the purposes of the trust.[31] There seems to be a trend to determine that the lease is "reasonably necessary" within the rule, when it is highly beneficial to all the parties and advantageous to the income of the estate.[32]

III

CHARITABLE TRUSTS

Since a charitable trust is frequently a perpetuity, and the trustee does not have to be guided at once by the interests of the beneficiaries and by the interests of the remaindermen, it is to be expected that greater discretionary power as to the execution of leases is held by the trustee of a charitable trust than by the trustee of a private trust. Still there should not be, upon principle, any difference except that based upon the precariousness of the term, in the case of private trusts. Thus, if the settlor of a charitable trust should provide that the trust should terminate upon the death of some third person, it would seem that there would be no greater power in the matter of execution of leases in such trustee than if the trust were private and not charitable.

Bank, 261 Ill. 450, 104 N. E. 275 (1914) (99-year lease authorized upon the ground of necessity by reason of changed character of neighborhood; in furtherance of presumed general plan of the testator).

[31] In re Hubbell Trust, *supra* note 2; Watland v. Good, 189 Iowa 1174, 179 N. W. 613 (1920); Marshall's Trustee v. Marshall, 225 Ky. 168, 7 S. W. (2d) 1062 (1928); St. Louis Union Trust Co. v. Van Raalte, *supra* note 23.

[32] In Marshall's Trustee v. Marshall, *supra* note 31, the testator devised the remainder of his estate to a trustee to hold in trust for the widow and son and the son's unborn children. The property included a storehouse and lot which rented for $14,000 per year under a lease to expire in 1932. The trustee filed a bill under the Declaratory Judgment Act, alleging that he had an offer to take a lease upon the premises for a term of 99 years, which would yield a net rent of over $20,000 per year, and that the lessee was to erect an eight story department store building on the property. Both the widow and son assented, the son having no children. It was held that the surrounding circumstances showed that it was necessary to

In England, although we have seen that as to private trusts the trustee's power is greatly limited,[33] the power of the trustee of a charitable trust to execute long term leases is very extensive.[34] In an Indiana case,[35] upholding perpetual leases by the trustee of a charitable trust, it is said that, as a general proposition, lands devised in trust for charitable uses should not be leased for long terms, without the order of a court of equity, but such leases, although perpetual, and executed without the order of the court, are not necessarily void, and will not be set aside unless it is made to appear that they are detrimental to the interests of the trust.[36] There seem to be no cases which pronounce a rule at variance with that expressed in the English and Indiana cases.[37]

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execute the 99-year lease properly to protect the interests of all the parties, since the old building could not be advantageously rented, and the new building would bring in more revenue and also make the property more valuable.

This is a much more liberal interpretation of the requirement of necessity for such a long term lease than the rule stated in In re Hubbell Trust, *supra* note 2.

[33] Wood v. Patteson; In re Shaw's Trust, both *supra* note 15.

[34] "That which the Court might have done, upon its own consideration of what would have been beneficial to the charity, might have been done by trustees, upon their own authority, in the exercise of their legal powers; and however imprudent it may have been in trustees to take so great a risk upon themselves, and in other parties to contract with them and take conveyances from them under such circumstances; yet, if upon consideration it should appear upon subsequent investigation, that the transaction was fair and beneficial to the charity at the time, it does not appear to be the duty of the court to set it aside, merely because circumstances have occurred, in which, at the time of inquiry and after the lapse of many years, it may be supposed that a greater revenue might have been derived from the specific property, than from the property substituted on the alienation complained of.

"The trustee is not permitted to act as he pleases, or upon his own view of what is best; he is so to act as to be always prepared to show to the satisfaction of a Court of Equity, that he has acted fairly and prudently in the administration of the trust, and for the benefit of the cestui que trust." Attorney General v. The South Sea Co., 4 Beav. 453, 458 (1841) (999-year lease of charitable property upheld).

In an earlier case, Attorney-General v. Owen, *supra* note 15, the trustees of a charitable trust executed a 99-year lease of a farm, and it was held that the lease could not stand without proof of a consideration, showing that it was fair and reasonable and for the benefit of the charity, the ordinary husbandry lease being for 21 years.

[35] City of Richmond v. Davis, *supra* note 10.

[36] See HILL, TRUSTEES (4th ed. 1867) 720-721.

[37] In Black v. Ligon, *supra* note 10, the testator devised lands to three trustees for the support of a charity school, the land never to be sold or alienated. The school was to be under the direction of five trustees to be elected every two years. It was held that the five trustees had the power to lease the trust property for a gross sum, without the reservation of an annual rent.

PRICE DISCRIMINATION UNDER THE CLAYTON ACT

The United States Supreme Court recently held by unanimous decision, in *George Van Camp & Sons Co. v. American Can Co.*, that discrimination in the sale price of an article, by which competition among the purchasers thereof is lessened, is illegal under section 2 of the Clayton Act.[1] The American Can Company, substantially without competitors, had sold cans to one packing company at lower prices than those allowed to a competing packing company. The case adds a new chapter to the law of trade regulation.

Since Adam Smith, freedom of competition has been not only an economic, but also a legal principle. Freedom of competition means freedom to sell to whom and at what price one pleases, so long as one does not interfere with another's freedom. So at common law one may refuse to sell to a buyer absolutely,[2] or on condition that he handle no goods of a competitor of the seller,[3] or on condition that he maintain a fixed resale price.[4] So one may discriminate in price as to place or person.[5] Neither of these practices appears to have been considered unfair competition, that is, an interference with another's freedom.

The state has found, however, that modern industry endangers the public's interest in a fair price to an extent not remediable by a *laissez faire* policy, and two methods have been tried to protect the consumer. One is direct, by fixing the price itself, the other indirect, by forbidding monopolies and restraints of competition.

Direct regulation of prices is an ancient device, known to Rome

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[1] George Van Camp & Sons Co. v. American Can Co., 49 Sup. Ct. 112 (U. S. 1929). Section 2 of the Clayton Act [38 STAT. 730 (1914), 15 U. S. C. § 13 (1926)] forbids discrimination in price where it substantially lessens competition "in any line of commerce," provided that it is not made because of differences in grade, quality, quantity, or selling or transportation costs, or that it is not made "in good faith to meet competition."

[2] See United States v. Colgate & Co., 250 U. S. 300, 307, 39 Sup. Ct. 465, 468 (1919); Brown, *The Right to Refuse to Sell* (1916) 25 YALE L. J. 194.

[3] Journal of Commerce Pub. Co. v. Tribune Co., 286 Fed. 111 (C. C. A. 7th, 1922).

[4] See State v. Scollard, 126 Wash. 335, 339, 218 Pac. 224, 225 (1923).

[5] *Cf.* Mogul S. S. Co. v. McGregor, [1892] A. C. 25 (discrimination lawful even when engaged in by combination). Common carriers, however, could not discriminate even at common law. 1 WATKINS, SHIPPERS & CARRIERS (3d ed. 1920) 411.

[6] See WILKINSON, STATE REGULATION OF PRICES IN AUSTRALIA (1917) 141: "Reasonable prices are essentially the ultimate aim and object of anti-trust legislation." Wilkinson points out the limited effectiveness of price fixing by direct legislation, and mentions two other methods of obtaining the desired result, entrance by the state into industry in competition with its citizens, and maintenance of state monopolies.

and the Middle Ages.[7] It was common in England and the North American colonies at the time of the revolution.[8] After a century in which the practice was in bad odor, it has been, especially under the stress of war, increasingly revived.[9] In the United States a limitation has been imposed that the industry be "affected with a public interest," [10] but this phrase is still defying definition.[11]

Indirect control of prices by curbing monopolies began in this country with statutes like the Sherman Act,[12] condemning contracts and combinations in restraint of trade. But an individual manufacturer could still pick his customers; he might refuse to sell to any but those who maintained his resale price or dealt exclusively in his own goods; [13] or he might discriminate, raising prices against buyers who would not agree to his terms,[14] lowering them in localities where he found competition.[15] Such practices were only unlawful when a contract or combination could be found by the court.[16] There have been statutes against discrimination in a number of states, some dealing with a particular

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[7] See Watkins, *The Law and the Profits* (1922) 32 YALE L. J. 29.

[8] See Note (1920) 33 HARV. L. REV. 838.

[9] *Cf.* WILKINSON, *loc. cit. supra* note 6; see MINNESOTA ACADEMY OF SOCIAL SCIENCES, PAPERS AND PROCEEDINGS (1913) Vol. 6, No. 6, at 41 (Roosevelt's plan to control all corporations as to price of output by commission).

[10] See Munn v. Illinois, 94 U. S. 113, 126 (1877).

[11] See Note (1920) 19 MICH. L. REV. 74. A state of emergency, and the demand of public opinion and morality have been held not to create a "public interest." A. M. Holter Hardware Co. v. Boyle, 263 Fed. 134 (D. Mont. 1920).

[12] 26 STAT. 209 (1890), 15 U. S. C. § 1 (1926).

[13] Frey & Son v. Cudahy Packing Co., 256 U. S. 208, 41 Sup. Ct. 451 (1921); United States v. Colgate & Co., *supra* note 2; Dunn, *Resale Price Maintenance* (1923) 32 YALE L. J. 676. It would seem to be in the interest of the public that resale prices be maintained, and the courts are generally willing to favor the practice. See Notz, *New Phases of Unfair Competition* (1921) 30 YALE L. J. 384, 387.

[14] Whitwell v. Continental Tobacco Co., 125 Fed. 454 (C. C. A. 8th, 1903); see Union Pacific Coal Co. v. United States, 173 Fed. 737, 739 (C. C. A. 8th, 1909).

[15] See STEVENS, UNFAIR COMPETITION (1917) c. I. This practice among the railroads was apparently the chief reason for rate regulation in the Interstate Commerce Act. See N. Y. N. H. & H. R. R. v. Interstate Commerce Comm., 200 U. S. 361, 391, 26 Sup. Ct. 272, 277 (1906). When the practice was taken up by large manufacturers it was one of the chief objects at which the Clayton Act was aimed. See *infra* note 37.

[16] Fed. Trade Comm. v. Beechnut Packing Co., 257 U. S. 441, 42 Sup. Ct. 150 (1922) (contracts and combination implied from general sales system); Wheeler-Stenzel Co. v. Nat. Window Glass Jobbers Ass'n, 152 Fed. 864 (C. C. A. 3d, 1907); United States v. Great Lakes Towing Co., 208 Fed. 733 (N. D. Ohio, 1913). In the Beechnut case it would seem that the combination is prohibited from doing what the defendant in the American Can Co. case, *supra* note 1, is being compelled to do, maintain uniform prices.

commodity affecting the welfare of the state,[17] others more general.[18] These statutes have been held constitutional, where the discrimination condemned is such as results in a restraint of competition or furthers a monopoly.[19] If the statute forbids all discrimination it is invalid as violating the constitutional right to liberty of contract,[20] the distinction apparently resting on the same basis as the price regulation statutes, in that some "public interest," here that of preventing a monopoly, is essential.[21]

In addition to these statutes against discrimination, the Interstate Commerce Act [22] forbids "unjust discrimination" as to railroad rates, and the Federal Trade Commission Act [23] provides for the regulation of "unfair competition," but neither of these statutes can be discussed in the scope of this comment.[24]

Section 2 of the Clayton Act, which was interpreted in the instant case, prohibits discrimination in price, "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce." [25] Decisions involving discrimination have not been frequent. There appears to be only one reported case, decided very recently,

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[17] *Cf.* State v. Bridgeman & Russell Co., 117 Minn. 186, 134 N. W. 496 (1912) (milk); State v. Standard Oil Co., 111 Minn. 85, 126 N. W. 527 (1910) (petroleum).

[18] *Cf.* State v. Drayton, 82 Neb. 254, 117 N. W. 768 (1908) (no discrimination in "commodities"). See statutes cited (1926) 26 COL. L. REV. 614. Under these statutes it does not appear to be unlawful to discriminate in buying. Indian Refining Co. v. Kellar, 203 Ky. 720, 263 S. W. 9 (1924); United States v. American Can Co., 230 Fed. 859 (D. Md. 1916). Discrimination between sections of a city does not come within a statute against local price discrimination. State v. Texas Co., 136 S. C. 200, 134 S. E. 211 (1926). These state statutes are then necessarily limited in effectiveness, especially as large trusts that are national in scope may discriminate between states with impunity. See JONES, TRUST PROBLEM IN THE UNITED STATES (1921) 358.

[19] Central Lumber Co. v. South Dakota, 226 U. S. 157, 33 Sup. Ct. 66 (1912); State v. Fairmont Creamery Co., 153 Iowa 702, 133 N. W. 895 (1911); Note (1928) 52 A. L. R. 169. But a statute declaring price discrimination is itself evidence of monopoly is unconstitutional. McFarland v. American Sugar Refining Co., 241 U. S. 79, 36 Sup. Ct. 498 (1916).

[20] Fairmont Creamery Co. v. Minn., 274 U. S. 1, 47 Sup. Ct. 506 (1927); (1928) 22 ILL. L. REV. 533; *cf.* Williams v. Standard Oil Co., 49 Sup. Ct. 115 (U. S. 1929).

[21] In the Fairmont Creamery Co. case last cited the industry was clearly "affected with a public interest," but the court held, three judges dissenting, that there was no immediate relation of the statute to the evil at which it was aimed, since it forbade discrimination without regard to monopoly.

[22] 24 STAT. 379 (1887), 49 U. S. C. § 2 (1926).

[23] 38 STAT. 719 (1914), 15 U. S. C. § 45 (1926).

[24] For a treatment of price cutting and preferences as "unfair competition," see STEVENS, *op. cit. supra* note 15, cc. I, VII.

[25] 38 STAT. 730 (1914), 15 U. S. C. § 13 (1926); see *supra* note 1.

holding a defendant responsible under the section.[26] The terms of the section may offer too many loopholes.[27] Giving favored rates to different classes of buyers is permissible if in good faith.[28] So one may discriminate between wholesalers and retailers; and to class co-operative associations of retailers separately from wholesalers is permissible.[29] Similarly where retailers are denied a quantity discount on pooled purchases, they cannot complain if chain stores receive the discount, the latter being single corporations and hence entitled to the quantity discount.[30]

It is obvious that discrimination may aid the discriminator to break down the competition which he faces, as in the case of local price cutting. But it may also affect his customers, driving out of competition those not favored. The *Mennen* case [31] stated, apparently obiter,[32] that section 2 of the Clayton Act was aimed by Congress at the restraint of competition among sellers of goods only, and that a restraint of competition among the purchasers discriminated against did not make the discrimination unlawful. The *National Biscuit Co.* case [33] repeated this, and apparently was helped thereby, in denying protection to single retailers against the chain stores.

Now Justice Sutherland, in the *American Can Co.* case, squarely overrules these dicta, and on the certification of two questions from the court below holds that it is unlawful under

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[26] Porto Rican American Tobacco Co. v. American Tobacco Co., 30 F. (2d) 234 (C. C. A. 2d, 1929) (manufacturers of "Lucky Strikes" attempting to capture Porto Rican market by selling at lower price than in United States).

[27] See *supra* note 1; see also JONES, *op. cit. supra* note 18, at 360. The statute, for example, does not prohibit a refusal to sell at any price. Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co., 227 Fed. 46 (C. C. A. 2d, 1915) (price-cutting retailer has no relief); *cf.* Coca-Cola Co. v. J. G. Butler & Sons, 229 Fed. 224 (E. D. Ark. 1916) (section 3 of Clayton Act similarly limited).

[28] S. S. Kresge Co. v. Champion Spark Plug Co., 3 F. (2d) 415 (C. C. A. 6th, 1925); Baran v. Goodyear Tire & Rubber Co., 256 Fed. 571 (S. D. N. Y. 1919).

[29] Mennen Co. v. Fed. Trade Comm., 288 Fed. 774 (C. C. A. 2d, 1923); Mechem, *Price Discrimination as Unfair Competition* (1923) 21 MICH. L. REV. 852.

[30] Nat. Biscuit Co. v. Fed. Trade Comm., 299 Fed. 733 (C. C. A. 2d, 1924); Note (1924) 38 HARV. L. REV. 103.

[31] *Supra* note 29.

[32] See brief of appellant, American Can Co. case, at 23. The argument in the Mennen case was based on the assumption that "any line of commerce" in the Clayton Act, *supra* note 1, was ambiguous, and attempted to show that the framers of the Act intended this to apply to the commerce of the sellers only. In the appellant's brief at 28 this contention was disproved by a fuller citation of the congressional records.

[33] *Supra* note 30.

section 2 of the Clayton Act to discriminate in price where this tends to lessen competition among the purchasers of the goods. The discriminator, the defendant in the case, assumedly had no competitors, so there could be no question of its using unlawful competitive methods. What its motive was does not appear, the questions certified merely eliminating the exceptions listed in the Act.[34]

The decision is the first handed down in the Supreme Court on section 2 of the Clayton Act.[35] Though it only answers the two questions certified, and hence does not pass on the constitutionality of the Act, it is believed that cannot now be doubted.[36] It appears to be a perfectly logical interpretation of the Act and the intentions of its framers.[37] And within its scope it appears wise, if it is assumed that the purpose of anti-trust legislation is the protection of the consuming public, and not of competitors of the trust.[38]

But it may be a dangerous precedent unless its scope is limited to an interpretation of the provisions of the Act involved. Discrimination is condemned by the Act if it is not made because of differences in grade, quality, or quantity, or selling or transportation costs, or if it is not "made in good faith to meet competition." It would seem that the bargaining power of a manufacturer may be seriously impaired unless a broad interpretation

[34] The questions asked if the Clayton Act prohibited discrimination which lessened competition in the line of commerce of the vendees of the discriminator, "said discrimination not being made on account of differences in the grade, quality or quantity of the commodity sold, . . . nor being made in good faith to meet competition." Compare the terms of section 2, *supra* note 1.

[35] But in two cases *certiorari* was denied. Fed. Trade Comm. v. Nat. Biscuit Co., 266 U. S. 613, 45 Sup. Ct. 95 (1924); Fed. Trade Comm. v. Mennen Co., 262 U. S. 759, 43 Sup. Ct. 705 (1923).

[36] In view of the constitutionality of the similar state statutes, see *supra* notes 19 and 20. The interpretation adopted in the instant case should not affect the constitutionality of section 2 of the Clayton Act if otherwise upheld.

[37] It was the practice of local price cutting by such large corporations as the Standard Oil Co. and the American Tobacco Co., engaged in to crush their small competitors, that was primarily responsible for the statute. See JONES, *op. cit. supra* note 19, at 77, 114; Mennen Co. v. Fed. Trade Comm., *supra* note 29, at 778. This was not the only objective of Congress in framing the Act. See *supra* note 32. But if the maintenance of competition among the purchasers of the discriminator had been an important objective it would seem that the Act would have prohibited also a complete refusal to sell. See *supra* note 27. Buyers injured by the methods of a seller are protected under the Sherman Act. See Comment (1929) 38 YALE L. J. 503, 511. And under the Trade Commission Act. Fed. Trade Comm. v. Beechnut Packing Co., *supra* note 16. And under section 3 of the Clayton Act. Q. R. S. Music Co. v. Fed. Trade Comm., 12 F. (2d) 730 (C. C. A. 7th, 1926).

[38] See *supra* note 6; also Central Lumber Co. v. South Dakota, *supra* note 19, at 161, 33 Sup. Ct. at 67.

is put on the latter exception, for any variation in price is likely to affect the competitive field of his purchasers and he will lay himself open to litigation if he does not charge all members of a class an equal price. It is believed that the rule allowing discrimination in favor of chain stores is not affected. But where two customers are both in one class, such as wholesalers, it will hamper business appreciably if the manufacturer must treat one exactly as he treats the other, unless "good faith" is made the final touchstone. "To meet competition" may without difficulty be extended to such a situation as that of the American Can Company, though in the instant case it appeared to have no competitors.[39] Moreover the case leaves the whole field of interpretation of the other phrases of the provision untouched. For instance, what is meant by "substantially" lessening competition, or "tend" to create a monopoly? It is to be hoped the rule of "possible evil," as exemplified in the recent *Trenton Potteries* case,[40] will not be extended here. If the scope of the instant case is not restricted it is likely to mean the breaking down of the very freedom of competition it professes to protect.

In effect an enlargement of the scope of the statutes against discrimination is an enlargement of governmental price control. Price fixing may be necessary in the case of public utilities, though its difficulty has added greatly to the burden of bureaucratic government. And some measure of price control may be necessary when the public is interested in other ways, as when there is an unscrupulous monopoly, or the business morale is weakened by "unfair competition" in the strict sense of "fraud, bad faith, deceit, or oppression."[41] But to apply the principle of price control to all commodities on all occasions, even to such an extent as the recent case may allow, if not kept within bounds, would seem to be a decided retrogression.[42]

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[39] In the Beechnut case, *supra* note 16, the manufacturer was held for unfair competitive practices though it had no competitors. Any manufacturer who has a monopoly by patent must "meet" the competition of other products. *Cf.* Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co., *supra* note 27; see Justice Holmes, dissenting, in Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373, 412, 31 Sup. Ct. 376, 386 (1911). See also Fed. Trade Comm. v. Gratz, 253 U. S. 421, 428, 40 Sup. Ct. 572, 575 (1920): "If a real competition is to continue the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved."

[40] United States v. Trenton Potteries, 273 U. S. 392, 47 Sup. Ct. 377 (1927).

[41] See Fed. Trade Comm. v. Gratz, *supra* note 39, at 427, 40 Sup. Ct. at 574; *cf.* Note (1924) 38 HARV. L. REV. 103, 106.

[42] See Carver, *Price Fixing in Time of Peace* (1919) 9 AM. ECON. REV. SUPP. 246, 247 (price fixing like lynching may be democratic, but it is not liberal); see Justice Lamar, dissenting, in German Alliance Ins. Co. v. Kansas, 233 U. S. 389, 430, 34 Sup. Ct. 612, 626 (1914).

"COMMON ENTERPRISE" IN THE LAW OF NEGLIGENCE

With the increase in automobile accidents, courts and lawyers have more and more attempted to fashion a workable formula of the "common enterprise." [1] Its chief application has been to impute the contributory negligence of the driver of a car to an individual accompanying him, in an action by the passenger against the negligent driver of another car. It has occasionally been invoked to thrust upon one personally guilty of no negligence a vicarious responsibility for the faults of one associated with him in a joint enterprise. No case has been found, however, which bars a recovery by the passenger against his driver on the avowed ground of common enterprise.[2] Sometimes the term is used to determine whether a plaintiff was under any "duty" to use care on his own part. The result then, of course, is an actual finding of contributory negligence on the part of the plaintiff himself.[3] The formula of joint enterprise has been adopted in most states,[4] including those which expressly repudiate the doctrine of imputed negligence.[5]

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[1] "Parties cannot be said to be engaged in a joint enterprise within the meaning of the law of negligence unless there be a community of interest in the objects or purposes of the undertaking and an equal right to direct and govern the movements and conduct of each other with reference thereto. Each must have some voice to be heard in its control and management." Cunningham v. Thief River Falls, 84 Minn. 21, 27, 86 N. W. 763, 765 (1901); see also Texas Traction Co. v. Woodall, 294 S. W. 873, 877 (Tex. Civ. App. 1927).

[2] In some cases the application of the doctrine has been definitely repudiated as having no bearing except as between one of the co-enterprisers and a third party. Wilmes v. Fournier, 111 Misc. 9, 180 N. Y. Supp. 860 (Sup. Ct. 1920); Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432 (1925); Harber v. Graham, 143 Atl. 340 (N. J. 1928). In others it has merely been determined that the facts of the case did not create the relation. *Cf.* Albritton v. Hill, 190 N. C. 429, 130 S. E. 5 (1925); Jessup v. Davis, 115 Neb. 1, 211 N. W. 190 (1926); Schwartz v. Johnson, 152 Tenn. 586, 280 S. W. 32 (1926) (action by occupant of car against parent of driver); Robinson v. Leonard, 100 Vt. 1, 134 Atl. 706 (1926); Labatte v. Lavalle, 155 N. E. 433 (Mass. 1927); Landry v. Hubert, 100 Vt. 268, 137 Atl. 97 (1927); Higgins v. Metzger, 143 Atl. 394 (Vt. 1928).

[3] *Cf.* Davis v. Chicago R. I. & P. Ry., 159 Fed. 10 (C. C. A. 8th, 1907); Brommer v. Penn. R. R., 179 Fed. 577 (C. C. A. 3d, 1910); Phila. & Reading Ry. v. LeBarr, 265 Fed. 129 (C. C. A. 3d, 1920).

[4] The following jurisdictions at least do lip-service to the rule: Alabama, California, Connecticut, Illinois, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Utah, Vermont, Virginia, Washington, and the third, fourth, eighth, and ninth circuits of the federal circuit courts of appeals.

[5] C. P. & St. Louis Ry. v. Condon, 121 Ill. App. 440 (1905); Cincinnati Traction Co. v. Hargrave, 2 Ohio App. 45 (1913); Anastasio v. Hedges, 207 App. Div. 406, 202 N. Y. Supp. 109 (1st Dep't 1923).

An excellent example of its somewhat fortuitous development is afforded by its history in Iowa. In *Artz v. Chicago, R. I. & P. R. R.*,[6] decided in 1871, the plaintiff was driving his team of horses on a road running parallel to the defendant's railroad track, along which he had an uninterrupted view for some distance. In an action for injuries sustained in a crossing accident with the defendant's locomotive, the court held as a matter of law that the plaintiff was guilty of contributory negligence. In 1874, in *Payne v. Chicago, R. I. & P. R. R.*,[7] the court was presented with a situation in which three companions were returning from a trip to an adjoining village, in a wagon owned by none of them and driven by another member of the party. The wagon was struck by a train under physical circumstances similar to those in the *Artz* case. In an action for personal injuries sustained it was held that the *Artz* case controlled, and since the driver was guilty of contributory negligence no recovery was allowed. No mention was made of common enterprise and no discussion undertaken of the imputation of the negligence. Not until *Nisbet v. Town of Garner*,[8] fourteen years later, was it explained that "The holding in the [*Payne*] case is not based upon the idea that the relation of principal and agent existed between the plaintiff and the person who was driving the team at the time, but rests upon the fact that the parties were engaged in a common enterprise or purpose in which each to some extent was responsible for the acts and conduct of the other." The doctrine today has a firm foothold in that state.[9]

Varying bases for the doctrine have been advanced. In one group of cases it is rested upon an agency between the parties;[10] in another a differentiation is made between an agency and a common enterprise;[11] and in yet another the analogy to a partnership is relied on.[12] The most frequent test is "control." This

[6] 34 Iowa 153 (1871).

[7] 39 Iowa 523 (1874).

[8] 75 Iowa 314, 39 N. W. 516 (1888).

[9] Wiley v. Dobbins, 204 Iowa 174, 214 N. W. 529 (1927).

[10] Howe v. Cent. Vt. Ry., 91 Vt. 485, 101 Atl. 45 (1917) (no common enterprise between parent and child, because for such each party must be the agent of the other and a child of two and a half years is incapable of such a relation); Kelley v. Hodge Transp. System, 197 Cal. 598, 242 Pac. 76 (1926); Farthing v. Hepinstall, 220 N. W. 708 (Mich. 1928).

[11] *Cf.* Labatte v. Lavalle, *supra* note 2 (master and servant; action between the two parties; no common enterprise); Louisville & N. Ry. v. Armstrong, 127 Ky. 367, 105 S. W. 473 (1907) (master and servant); McKernan v. Detroit Citizens' Street Ry., 138 Mich. 519, 101 N. W. 812 (1904); Sylvester v. St. Paul City Ry., 153 Minn. 516, 191 N. W. 46 (1922).

[12] Fisher v. Johnson, 238 Ill. App. 25 (1925) (neighbors alternately driving each other to and from business held not to be engaged in a common enterprise because the relation is based upon a "quasi-partnership"); Kokesh v. Price, 136 Minn. 304, 161 N. W. 715 (1917) (husband

must consist of more than the mere privilege of selecting the route.[13] It must include an equal right of control by each party over the other;[14] or control of the operation of the vehicle,[15] or control of the driver.[16] But with possible exceptions where the

and wife with children on fishing trip; no common enterprise); see Note (1929) 77 U. OF PA. L. REV. 676, 679.

[13] Kelley v. Hodge Transp. System, *supra* note 10; HUDDY, AUTOMOBILES (8th ed. 1927) § 811, and cases there cited.

[14] In the following cases lack of such control prevented the situation from being a common enterprise: North Texas Traction Co. v. Woodall, *supra* note 1 (property owner gratuitously transporting employees of building contractor working on his houses from one job to another); Landry v. Hubert, *supra* note 2 (pleasure trip; suit between members); Meyers v. Southern Pac. Co., 63 Cal. App. 164, 218 Pac. 284 (1923) (social call); Chicago City Ry. v. Nonn, 133 Ill. App. 365 (1907); Cunningham v. Thief River Falls, *supra* note 1.

[15] In the following cases lack of equal right to control the operation of the vehicle prevented the situation from being a common enterprise: Wren v. Suburban Motor Transfer Co., 241 S. W. 464 (Mo. App. 1922) (car driven by real estate salesman, plaintiff, a prospective buyer, was in the rear seat returning from inspection of the house); Director Gen. of R. Rs. v. Pence's Adm'x, 135 Va. 329, 116 S. E. 351 (1923) (plaintiff in front seat of car operated by employee of jobbing concern; plaintiff was employee of manufacturer and introducing new product to jobbers clientele); Koplitz v. City of St. Paul, 86 Minn. 373, 90 N. W. 794 (1902) (plaintiff, a young lady, riding in interior of horse-drawn bus, rented by young men for a picnic); Bowley v. Duca, 80 N. H. 548, 120 Atl. 74 (1923) (plaintiff and husband taking their children for an airing; husband driving; not shown where plaintiff was riding); Barry v. Harding, 244 Mass. 588, 139 N. E. 298 (1923) (plaintiff picked up on way to work by employee of garage testing a repaired car; plaintiff in rear seat); Pope v. Halpern, 193 Cal. 168, 223 Pac. 470 (1924) (plaintiff on joy ride on rear seat of motorcycle owned by driver); Moore v. Almendinger, 15 Ohio App. 503 (1922) (plaintiff on front seat of car on a fishing trip); Alperdt v. Paige, 140 Atl. 555 (Pa. 1928) (plaintiff on front seat of car on pleasure ride with husband).

In Kirkland v. Atchison T. & S. F. Ry., 104 Kan. 388, 179 Pac. 362 (1919), the plaintiff's decedent was instructing a new employee on a milk route. It was not shown who was driving, but the court said that since from the evidence the deceased must have had an equal or superior right of control, he was engaged in a common enterprise so as to prevent recovery for his death.

[16] In the following cases lack of control over the driver in his operation of the car prevented the situation from being a common enterprise: Wagner v. Kloster, 188 Iowa 174, 175 N. W. 840 (1920) (brother-in-law as guest of driver on return from picnic); Ronan v. J. G. Turnbull Co., 99 Vt. 280, 131 Atl. 788 (1926) (young lady as guest of young man on return from football game); Charlestown & W. C. Co. v. Alwong, 258 Fed. 297 (C. C. A. 4th, 1919) (plaintiff was soldier riding on truck driven by a member of another branch of the service); Stoker v. Tri-City Ry., 182 Iowa 1090, 165 N. W. 30 (1917) (plaintiff was ice cream salesman furnished with truck and driver by employer; did not select his own driver); Kepler v. Chicago St. P. M. & O. Ry., 111 Neb. 274, 196 N. W. 161 (1925) (plaintiff had been driven by brother to town to mail some letters).

In the following cases sufficient control over the driver was found to

negligence consists in failing to slow down at a railroad crossing, and a few like situations, it is difficult to perceive how a person not actually driving the vehicle, even though he may possess all three species of control, could, as a matter of fact, exercise any effective dominion over its operation. Likewise the suggestion that the common interest must exist not in the purpose for which the trip is being taken, but in the operation of the car,[17] although logically satisfying would seem difficult to apply practically.

If the parties engaged in a trip share equally in the expenses, the situation is considered one of common enterprise;[18] but the doctrine is not applied to the case of firemen riding upon a fire truck.[19] With the exception of these two categories there is irreconcilable confusion. The mere riding for pleasure does not create a common enterprise.[20] The relation of husband and

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create a common enterprise: Langley v. Southern Ry., 113 S. C. 45, 101 S. E. 286 (1919) (plaintiff and husband driving guests to train; speed of car increased at request of plaintiff; dissent on the ground that plaintiff had no right of control); Masterson v. Leonard, 116 Wash. 551, 200 Pac. 320 (1921) (plaintiff, entrusted with father's bicycle, being ridden upon the cross bar by another boy). In Wiley v. Dobbins, *supra* note 9, the plaintiff was a member of a family all of whom had contributed to the purchase of a car. The entire family were being driven on a pleasure ride in it by the fiancé of plaintiff's sister. The court here found a common enterprise because no one had any special right of control.

It is interesting to note that the control test in its various applications results more frequently in the rejection of the doctrine of common enterprise than in its adoption.

[17] In Moore v. Almendinger, *supra* note 15, the court decided that although there might be a common purpose in a fishing trip there was none in car-driving. It was found necessary to explain that the common enterprise found in N. Y., Chicago & St. Louis Ry. v. Kistler, 66 Ohio St. 326, 64 N. E. 130 (1902) consisted in "listening." In that case a deaf father had taken his daughter with him upon a buggy ride to warn him of approach of the trains. The action was by the daughter for personal injuries sustained in a crossing accident with the defendant's locomotive.

[18] Jensen v. Chicago M. & St. P. Ry., 133 Wash. 208, 233 Pac. 635 (1925) (parties returning from witnessing a prize fight); Beaucage v. Mercer, 206 Mass. 492, 92 N. E. 774 (1910) (no evidence of purpose of trip); Adams v. Swift, 172 Mass. 521, 52 N. E. 1068 (1899) (sharing of buggy hired for pleasure trip made common enterprise for purpose of creating a vicarious responsibility); see Griffiths v. Lehigh Valley Transit Co., 141 Atl. 300 (Pa. 1928) (three salesmen making their rounds together).

[19] Elyton Land Co. v. Mingea, 89 Ala. 521, 7 So. 666 (1889); McBride v. Des Moines City Ry., 134 Iowa 398, 109 N. W. 618 (1906); Donoghue v. Holyoke Street Ry., 246 Mass. 485, 141 N. E. 278 (1923); Ring v. Minneapolis Street Ry., 173 Minn. 265, 217 N. W. 130 (1927) McKernan v. Detroit Citizens' Street Ry., *supra* note 11.

[20] Landry v. Hubert, *supra* note 2 (action between alleged co-enterprisers); Schwartz v. Johnson, *supra* note 2, *semble;* Koplitz v. City of St. Paul, *supra* note 15 (no contributory negligence imputed); Ronan v. J. G. Turnbull Co., *supra* note 16, *semble;* HUDDY, *loc. cit. supra* note 13. *Contra:* Wentworth v. Town of Waterbury, 90 Vt. 60, 96 Atl. 334 (1916). This

wife offers little assistance,[21] as does that of family kinship.[22] The cases are directly split upon whether a buyer and seller riding together constitute common enterprisers.[23] A hirer of a livery coach is not engaged in a common enterprise with the driver.[24] The negligence of an employer may or may not, as a common enterpriser, be imputed to an employee riding with him.[25]

case has been severely criticized. *Cf.* Bowley v. Duca, *supra* note 15; Bryant v. Pacific Elec. Ry., 174 Cal. 737, 164 Pac. 385 (1917).

In the following cases sufficient added facts made a common enterprise: Washington & O. D. Ry. v. Zell's Adm'x, 118 Va. 755, 88 S. E. 309 (1916) (deceased and a friend accustomed to take trips together in a car owned by friend; deceased in this instance got car from garage and planned the trip; not shown who was driving); Jensen v. Chicago M. & St. P. Ry., *supra* note 18 (expense sharing); Beaucage v. Mercer, *supra* note 18, *semble; cf.* Davis v. Chicago R. I. & Pac. Ry., *supra* note 3 (old friends; both knew of dangerous crossing); Philadelphia & Reading Ry. v. LeBarr, *supra* note 3; Brommer v. Pennsylvania R. R., *supra* note 3.

In Cullinan v. Tetrault, 123 Me. 302, 122 Atl. 770 (1923), the negligence of one buying poison instead of "checkerberry" to be used in making an intoxicating drink was imputed to one who waited outside the drugstore.

[21] No common enterprise: Stinson v. Maine Cent. Ry., 81 N. H. 473, 128 Atl. 562 (1925) (husband driving, he to attend business, plaintiff to buy clothes for their children); Pettitt v. Kansas City, 267 S. W. 954 (Mo. App. 1925); Kokesh v. Price, *supra* note 12; Alperdt v. Paige, *supra* note 15; Brubaker v. Iowa County, 174 Wis. 574, 183 N. W. 690 (1921); Bowley v. Duca, *supra* note 15; Corn v. Kansas City C. & C. St. J. Ry., 228 S. W. 78 (Mo. 1921) (on way to meet daughter). Common enterprise was found in: Langley v. Southern Ry., *supra* note 16; Van Bergen v. Erie R. R., 70 Pa. Super. 46 (1918) (driving wife's [plaintiff's] mother to railroad station; wife also knew of dangerous crossing); *cf.* Delaware and Hudson Co. v. Boydon, 269 Fed. 881 (C. C. A. 3d, 1921) (holding charge that husband and wife on a fishing trip were engaged in a common enterprise was correct).

[22] In the following cases there was held to be no common enterprise: Farthing v. Hepinstall, *supra* note 10 (brother and sister); Chicago R. I. & Gulf Ry. v. Johnson, 224 S. W. 277 (Tex. Civ. App. 1920) (sister-in-law had been to aid in birth of brother-in-law's child; he was driving); Kepler v. Chicago St. P. M. & O. Ry., *supra* note 16; Howe v. Central Vt. Ry., *supra* note 10; Bryant v. Pacific Elec. Ry., *supra* note 20 (mother and son); see Barrett v. Chicago M. & St. P. Ry., 190 Iowa 509, 521, 175 N. W. 950, 955 (1920) (father and son-in-law). *Contra:* Wiley v. Dobbins, *supra* notes 9 and 16.

[23] No common enterprise was found in: Wren v. Suburban Transfer Co., *supra* note 15 (real estate broker driving prospective purchaser to inspect house); Sylvester v. St. Paul City Ry., *supra* note 11 (*semble;* property owner driving). Common enterprise was found in: Southern Pac. Co. v. Wright, 248 Fed. 261 (C. C. A. 9th, 1918) (prospective purchaser of truck, and seller's driver transporting buyer's goods therein for demonstration purposes); Tannehill v. Kansas City C. & C. Ry., 229 Mo. 170, 213 S. W. 818 (1919) (arrived at by process of eliminating master and servant, principal and agent, and guest relationships).

[24] Cotton v. Willmar & Sioux Falls Ry., 99 Minn. 366, 109 N. W. 835 (1906).

[25] Robertson v. United Fuel & Supply Co., 218 Mich. 271, 187 N. W. 300

The same is true of co-employees,[26] and it follows that a gratuitous assistant is not necessarily a co-enterpriser.[27]

The courts are attempting to draw a definite line between common enterprise and guest relationship, in which in absence of statute there is no imputation of negligence.[28] They are loath to denominate a situation common enterprise, for they have not been friendly toward the application of the doctrine.[29] In fact, it has been stated that the absence of special circumstances will make the passenger a guest rather than a co-enterpriser.[29] There is more hesitance in allowing a third person to sue an alleged "co-enterpriser" who was engaged in no operative negligence than in denying the co-enterpriser a cause of action against a negligent third party.[31]

The doctrine of common enterprise has obviously not yet reached a stage of crystallization.[32] For the purpose of the

(1922) (not so imputed); Louisville & N. Ry. v. Armstrong, *supra* note 11 (so imputed); *cf.* Labatte v. Lavalle, *supra* note 2 (no common enterprise; suit between parties).

[26] No common enterprise: Baxter v. St. Louis Transit Co., 130 Mo. App. 597, 78 S. W. 70 (1903) (plaintiff delivering ice; companion drove wagon and handed ice to him); Ohio City Ry. v. Nonn, 133 Ill. App. 365 (1907) (helper to truck driver); Stoker v. Tri-City Ry., *supra* note 16; Director-Gen. of R. Rs. v. Pence's Adm'x, *supra* note 15; Scheib v. N. Y. C. Ry., 115 App. Div. 578, 100 N. Y. Supp. 986 (2d Dep't 1906); Kansas City M. & O. Ry. v. Durrett, 187 S. W. 427 (Tex. Civ. App. 1916); McCrotty v. B. & O. S. W. R. R., 229 Ill. App. 117 (1923). See also cases cited *supra* note 17.

A common enterprise was found in: Alabama Great So. Ry. v. Hanbury, 161 Ala. 358, 49 So. 467 (1909) (conductor and engineer on train); Hoffman v. Pittsburg & L. E. Ry., 278 Pa. 246, 122 Atl. 274 (1923) (both parties working on ice wagon); Kirkland v. Atchison T. & S. F. Ry., *supra* note 15; see Martin v. Puget Sound Elec. Ry., 136 Wash. 663, 241 Pac. 360 (1925) (parties delivering lumber; plaintiff not driving but had alighted to repair lights on the truck).

[27] Schlomowitz v. Lehigh Valley Ry., 201 App. Div. 438, 194 N. Y. Supp. 520 (1st Dep't 1922) (three-to-two decision); Hines v. Welch, 229 S. W. 681 (Tex. Civ. App. 1921).

[28] *Cf.* Pope v. Halpern, *supra* note 15; Withey v. Fowler Co., 164 Iowa 377, 145 N. W. 923 (1914); Barrett v. Chicago Mil. & St. Paul Ry., *supra* note 22; Wagner v. Kloster, *supra* note 16; Albritton v. Hill, *supra* note 2; Ronan v. J. G. Turnbull Co. *supra* note 16.

[29] *Cf.* cases *supra* notes 14, 15 and 16.

[30] Pusey v. Atlantic Coast Line Ry., 181 N. C. 137, 106 S. E. 452 (1922).

[31] Reiter v. Grober, 173 Wis. 493, 181 N. W. 739 (1921).

[32] This is evidenced by the fact that in absence of disputed facts the question is for the court and not the jury. The courts as yet have not been able to fix a sufficiently accurate definition. Masterson v. Leonard, *supra* note 16; Barrett v. Chicago & St. P. Ry., *supra* note 22; Meyers v. Southern Pac. Co., *supra* note 14; (reversing a submission of the question to the jury based upon a standard dictionary definition). *Contra:* Ward v. Meeds, 114 Minn. 18, 130 N. W. 2 (1911); Robison v. Oregon-Wash. R. & Nav. Co., 90 Ore. 490, 176 Pac. 594 (1918); Nisbett v. Town of Garner, *supra* note 8 (seemingly overruled by the Barrett case *supra*). More often the court

imputation of negligence, master and servant, principal and agent, and partnership are all varying degrees of the same relationship. Common enterprise may include those situations which do not readily fit into the classification of master and servant and principal and agent, and yet do not reach the dignity of a partnership.[33] The basis of the imputation of negligence here may well be, as in a partnership, a common agency.[34] It affords a formula for situations which the court cannot readily classify yet where the relation of the parties is such that the fault of one seems justly to preclude recovery by the other, or throw upon him a vicarious responsibility for that fault; and it does so without adverting to the much broader doctrine of *Thorogood v. Bryan*.[35] Despite the objection of want of predictability, in the very flexibility of the formula lies its value.

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passes thereon without consideration of whose province it is. Beaucage v. Mercer, *supra* note 18; Director-Gen. of R. Rs. v. Pence's Adm'x, *supra* note 15; Baxter v. St. Louis Transit Co., *supra* note 26; Kirkland v. Atchison T. & S. F. Ry., *supra* note 15; Southern Pac. Co. v. Wright, *supra* note 23; Stinson v. Maine Cent. Ry., *supra* note 21; Koplitz v. City of St. Paul, *supra* note 15.

[33] The situation is obviously closely akin to the business relation of joint adventures. See WRIGHTINGTON, UNINCORPORATED ASSOCIATIONS (1916) 6.

[34] See MECHEM, ELEMENTS OF PARTNERSHIP (2d ed. 1920) § 301.

[35] 8 C. B. 115 (C. P. 1849). The contributory negligence of an omnibus driver was imputed to a passenger. Followed to its logical conclusion, practically all negligence of the driver of a vehicle would be imputed to his passenger. The case has been repudiated in England, and in this country. See THOMPSON, COMMENTARIES ON THE LAW OF NEGLIGENCE (2d ed. 1905 & Supp. 1914) §§ 499, 3067, 3069; (1926) 35 YALE L. J. 766.